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Estate Tax Apportionment under the New South Carolina Probate Code

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NOTES

ESTATE TAX APPORTIONMENT UNDER THE NEW SOUTH CAROLINA PROBATE CODE

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I. INTRODUCTION

An estate tax is a duty imposed upon the right of a decedent to transfer property at death. As the amount of the tax has increased over the years, the question of who will bear the burden of the estate tax has received increasing attention from estate planners and commentators alike.

Although a decedent is free to designate in a will which of his assets will bear the estate tax liability, this issue is often left unresolved. When the will fails to designate which assets will incur liability, the state must make either a legislative or judicial determination of which assets will bear the burden of state and federal estate taxes.

This Note will review the different methods that states have chosen to allocate this burden and the policies behind each method. Following this review, an in-depth review of South Carolina's estate tax allocation experience will be undertaken. The review will contain an analysis and critical evaluation of the estate tax apportionment provisions in the recently enacted South Carolina Probate Code ("the Probate Code"). First, however, the historical underpinnings behind the concept of estate tax apportionment will be examined.

II. THE HISTORY OF ESTATE TAX APPORTIONMENT

The federal estate tax,[1] as it is presently known,[2] was en-

1. I.R.C. §§ 2001-2663 (1986). The estate tax computation for estates of United States citizens involves several steps. The starting point for the computation of the tax is the calculation of the decedent's gross estate. The gross estate includes not only property of the decedent passing by will or under the intestate laws, but it also includes the value of certain non-probate assets included under §§ 2035-2044. Following the calculation of the gross estate, the taxable estate is determined by subtracting from the gross estate the deductions authorized under § 2053 (funeral and administrative expenses, claims and debts), § 2054 (casualty losses), § 2055 (charitable bequests), and § 2056 (marital deduc-

acted in 1916 as a revenue raising device during the first World War.[3] The tax was different from many state-imposed inheritance taxes that taxed a beneficiary's right to receive property at a decedent's death.[4] In *Y.M.C.A. v. Davis*[5] the United States Supreme Court distinguished the estate tax from the inheritance tax as follows:

> What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. . . . What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.[6]

As the federal estate tax evolved, it taxed far more than those assets passing under a decedent's will. Under several sections of the Internal Revenue Code ("the Code"),[7] Congress mandated that, because certain transfers outside of the probate estate were testamentary in nature, the value of these non-probate transfers also should be included in the taxable estate of the decedent.[8] These non-probate transfers have come to include: (1) completed gifts made within three years of death,[9] (2) transfers with a retained life interest or with a retained power to designate the right to enjoy the benefits of the transferred prop-

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tion). Following the addition of any adjusted taxable gifts to the taxable estate, the unified transfer tax rates, as set out in § 2001, are applied to the adjusted taxable base. The actual tax due is determined by the tax due on the taxable estate less any of the following applicable credits: unified credit (§ 2010), credit for state death taxes paid with respect to property included in the gross estate (§ 2011), death taxes paid to a foreign country in respect of property situated in a foreign country and included in the gross estate (§ 2014), and federal estate taxes paid by another decedent with respect to the property transferred by that decedent to the current decedent (§ 2013). 4 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 53.01 (1987).

2. Congress enacted and repealed death taxes on several occasions prior to 1916. Eisentein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 223-26 (1956).

3. *Id.*

4. Comment, *Apportionment of the Federal Estate Tax—Should North Carolina Adopt an Apportionment Statute?*, 52 N.C.L. REV. 737, 738 (1974).

5. 264 U.S. 47 (1924).

6. *Id.* at 50.

7. I.R.C. §§ 2031-2044.

8. Note, *Equitable Apportionment of the Federal Estate Tax Liability: The Necessity of Clarifying Legislation*, 1979 U. ILL. L.F. 703, 703.

9. I.R.C. § 2035.

erty,[10] (3) transfers taking effect at death,[11] (4) revocable trusts,[12] (5) transfers by virtue of interests held by the decedent in joint tenancy,[13] (6) property subject to a general power of appointment,[14] (7) transfers for less than full or adequate consideration,[15] (8) certain annuities and nonqualified employee benefits,[16] and (9) proceeds of life insurance policies.[17]

Although making the personal representative responsible for its payment,[18] the early federal estate tax[19] did not address the question of who bears the tax burden.[20] Three provisions that singled out three non-probate transfers to bear their share of the estate tax liability, however, were subsequently added to the Code. In 1919 the Code was amended to permit the executor to recover contributions for payment of estate taxes from benefi-

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10. *Id.* § 2036.

11. *Id.* § 2037. These transfers are deemed to take effect at death either because the recipient must survive the testator to receive the transferred property or because the testator retains a reversionary interest.

12. *Id.* § 2038.

13. *Id.* § 2040.

14. *Id.* § 2041.

15. *Id.* § 2043.

16. *Id.* § 2039.

17. *Id.* § 2042.

18. *Id.* § 205 (current version at I.R.C. § 2002) stating "the tax imposed by this chapter shall be paid by the executor." If any portion of this tax is paid by a recipient of non-probate property, that recipient is entitled to reimbursement from the personal representative under I.R.C.§ 2205. Section 2205 provides:

> If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such persons shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Unless an extension is granted, the personal representative must pay the tax at the time the estate tax return is filed with the Internal Revenue Service ("IRS"). If the tax is not paid by the personal representative when it is due, a tax lien will be placed upon all the real and personal property of the personal representative in favor of the United States Government. I.R.C.§ 6321.

19. Revenue Act of 1916, ch. 463, § 200, 39 Stat. 777 (1916) (current version at I.R.C. §§ 2001-2663 (1987)).

20. Comment, *Federal Estate Tax Apportionment*, 16 DE PAUL L. REV. 112, 114 (1966).

ciaries of life insurance policies. In 1942 a similar section was added to permit the executor to recover contributions for payment of estate taxes from beneficiaries of a general power of appointment.[21] Finally, in 1981, section 2207A was added to permit the executor to recover contributions for payment of estate taxes from beneficiaries of Q-TIP property.[22] Except for these three provisions, the Code has remained silent on apportionment, leaving the states to decide the issue of who bears the federal

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21. I.R.C.§ 2206 (life insurance) (originally enacted as Revenue Act of 1919, ch. 18,§ 400, 40 Stat. 1100 (1919)); I.R.C. § 2207 (powers of appointment) (originally enacted as Revenue Act of 1942, ch. 619, § 403(c), 56 Stat. 943 (1942)). These provisions apply in the absence of a contrary provision in the decedent's will. Also, these sections contain a provision that allocates the marital deduction in an estate, first to insurance proceeds and then to powers of appointment.

The language of these sections does not impose a mandatory requirement on the personal representative to seek contribution. At least one court, however, has held that these provisions are mandatory. Pearcy v. Citizens Bank & Trust Co., 121 Ind. App. 136, 96 N.E.2d 918 (1951).

In those states having an apportionment statute, it and the Code mandate that the share of the estate tax attributable to Q-TIP property, life insurance proceeds, or general powers of appointment be borne by the beneficiary of the property. In states requiring that the residuary bear the tax liability, the federal apportionment provisions control. *See infra* p. 614 & note 39.

22. I.R.C.§ 2207A. Under § 2056, a marital deduction is allowed for property included in the gross estate that passes to a surviving spouse. The deduction, however, contemplates that the surviving spouse will receive the entire interest in the property transferred. In situations in which the surviving spouse receives less than the entire interest in the property, the bequest may be classified as a terminable interest and not qualify for the marital deduction. Life estates, estates for years, annuities, patents, and copyrights are examples of estates that the Code identifies as terminable. RABKEN & JOHNSON, *supra* note 1, § 53.05.

The Economic Recovery Tax Act of 1981 allows certain terminable interests to qualify for the marital deduction in post-1981 estates. Under § 2056(b)(7), a testator may leave a surviving spouse a life estate in certain trust income, for example, a Q-TIP trust, which qualifies for the marital deduction if certain requirements are met. The testator may direct who will receive the property after the spouse's death since the Code does not require that the surviving spouse be given a power of appointment over the property. RABKEN & JOHNSON, *supra* note 1, § 53.05.

To qualify for the marital deduction, the personal representative of the decedent's estate must irrevocably elect to claim the marital deduction on the estate tax return. I.R.C. § 2056 (b)(7)(B)(V). Also, the surviving spouse must be entitled to all of the income from the property, the income must be payable at least annually, and no person should have a power to appoint any part of the property during the spouse's lifetime. I.R.C. § 2056(b)(7)(B)(ii).

Under § 2207A, unless the surviving spouse's will provides otherwise, the estate may recover from the Q-TIP property any additional estate tax resulting from the inclusion of the property in the gross estate. If there are two or more beneficiaries, the entire amount of the additional estate tax may be recovered from either beneficiary. RABKIN & JOHNSON, *supra* note 1, § 53.05.

estate tax burden.

The early federal estate tax was so modest that most states treated it as just another claim against the estate, charging it to the residuary estate.[23] As the purpose of the tax began to shift from a revenue raising device toward a means of redistributing wealth, the tax rates began to rise gradually.[24] As states began using the burden-on-the-residue rule in a climate of higher estate tax rates, plaintiffs began requesting equitable apportionment in situations in which the federal estate tax exhausted the residuary estate.[25]

Although one early New Hampshire case[26] did allow the apportionment of the federal estate tax to certain specific legatees in a will, the common law almost unanimously upheld the burden-on-the-residue rule over efforts to apportion the tax to other probate and non-probate beneficiaries.[27] The rationale for this rule appears to have rested on three separate views. One view suggested that Congress had preempted the field of apportionment and precluded the states from acting in this area since it had already authorized apportionment of life insurance and general powers of appointment.[28] Another view suggested that a decedent had impliedly manifested his intention that the tax burden fall on the residuary estate when a will contained specific devises along with a residuary gift.[29] The third view equated the Code's requirement that the executor pay the estate tax prior to the distribution of the probate property with the common-law requirement that all debts and administrative expenses be paid from the residuary clause. Since the estate tax obligation was an estate debt, it was required to be paid out of the residuary estate.[30]

In an attempt to ameliorate the problems presented by the

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23. Wintermute, *Equitable Apportionment of Federal Estate Tax in Arizona*, 17 ARIZ. L. REV. 1135, 1139 (1975).

24. *Id.*

25. *See* Comment, *supra* note 20, at 114.

26. Fuller v. Gale, 78 N.H. 544, 103 A. 308 (1918).

27. *See* Comment, *supra* note 20, at 115.

28. *Id.* (citing Bernis v. Converse, 246 Mass. 131, 140 N.E. 686 (1923); Farmers Loan Co. v. Winthrop, 238 N.Y. 488, 144 N.E. 769 (1924), *cert. denied*, 266 U.S. 633 (1925)).

29. *Id.* at 114 (citing Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd*, 264 U.S. 47 (1924)).

30. *Id.* at 114-15 (citing Hephburn v. Winthrop, 83 F.2d 566 (D.C. Cir. 1936); Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N.E. 265 (1919)).

burden-on-the-residue rule, New York adopted the first apportionment statute in 1930.[31] This statute was a total apportionment statute, apportioning the estate tax among all of the taxable estate's probate and non-probate beneficiaries on a pro rata basis.[32] Some ten years after the statute was passed, however, its constitutionality was challenged in *Riggs v. Del Drago*.[33]

Del Drago concerned a will with three major components. One legatee, in addition to receiving certain specific bequests, received the residuary estate in the form of a life trust, the remainder going to other designated parties. The will also created a second trust with designated life and remainder interests. Since the will did not provide for the payment of estate taxes, the executor of the testator's estate sought to have the taxes apportioned in accordance with the New York statute. In response, the life tenants and the outright legatee filed a suit challenging the statute's constitutionality. The remainderman of the residuary trust contended that the estate tax had to be apportioned under the statute.[34]

Although the New York Court of Appeals invalidated the statute on the ground that it violated the supremacy clause of the constitution,[35] the United States Supreme Court reversed, holding:

> We are of the opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax. . . .[36]

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31. Wintermute, *supra* note 23, at 1140.

32. *Id.*

33. 317 U.S. 95 (1942) (*rev'g In re* Del Drago's Estate, 287 N.Y. 61, 38 N.E.2d 131 (1941)).

34. *Id.* at 96-98.

35. In its opinion, the New York Court of Appeals invalidated the New York statute because it conflicted with the provisions of the Code, in violation of the supremacy clause of the Constitution. 287 N.Y. at 79, 38 N.E.2d at 140. The particular provision in question was section 826(b) of the 1939 Code, now I.R.C. § 2205, which states: "so far as practicable . . . the tax shall be paid out of the estate before its distribution." The court also noted that the statute was at odds with another provision of § 826(b) that gave a beneficiary who pays the tax the right "to reimbursement out of any part of the estate still undistributed or by just and equitable contribution by the person whose interests in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate." 287 N.Y. at 70, 38 N.E.2d at 135.

36. 317 U.S. at 97-98.

The Court reasoned that Congress had not intended to control the allocation of the estate tax burden under the Code.[37] Although the Code imposed a duty on the executor to pay the estate tax prior to the distribution of the probate assets, the Court noted that these provisions provided only a statutory mechanism for the collection and payment of the tax and did not determine upon whom the burden of the tax fell.[38] While the Court sanctioned the role of state statutes in determining who should bear the tax burden, it neglected to address the role, if any, of the Code's existing apportionment provisions in determining this issue.[39]

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37. *Id.* at 98.

38. *Id.*

39. By enacting I.R.C. § 2205, Congress manifested its intent that the federal estate tax be allocated to the residuary estate. *Del Drago*, however, stated that this provision was permissive, giving the states the latitude of enacting their own apportionment schemes. As previously noted, Congress attempted to apportion estate taxes with regard to three types of non-probate property: Q-TIP trusts, general powers of appointment, and life insurance proceeds. *See supra* notes 21, 22, and accompanying text. Since *Del Drago* apparently held that state law determines who bears the burden of the estate tax, the question has been raised whether sections 2206, 2207, and 2207A would prevail over contrary state law provisions. *See* Kahn, *The Federal Estate Tax Burden Borne by a Dissenting Widow*, 64 MICH. L. REV. 1499, 1511 (1966); Wintermute, *supra* note 23, at 1136-37 n.7 ("Where this conflict occurred, it would be necessary to determine whether the Internal Revenue Code preempts local statutory or common law.").

Several decisions have held that the federal provisions apportioning the estate tax to certain non-probate transfers preempt state statutory and common law. McAleer v. Jernigan, 804 F.2d 1231 (11th Cir. 1986), is illustrative. *McAleer* was an action by the administrator of an estate against the decedent's former wife, pursuant to I.R.C. § 2206, to recover the share of the estate taxes attributable to certain life insurance proceeds. The former wife asserted that, pursuant to Alabama's apportionment statute, the residuary estate was responsible for the payment of the entire estate tax obligation. Requiring that a percentage of the tax be apportioned to the former wife, the court held:

> [U]nder the reasoning of [*Del Drago*], in the absence of congressional enactments to the contrary, state law governs the allocation of the burden of taxes as to property that is part of the estate, and where Congress has spoken, as with life insurance proceeds not part of the estate, federal law governs.

804 F.2d at 1233. For other cases holding that federal apportionment provisions prevail over contrary state law, see Priedeman v. Jamison, 356 Mo. 627, 202 S.W.2d 900 (1947); First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978); *In re* Singer's Estate, 80 Misc. 2d 1006, 363 N.Y.S.2d 746 (Surr. Ct. 1975). In states having an estate tax, the apportionment of the state estate tax with respect to life insurance proceeds and general powers of appointment is determined by the state statute. *See In re* William's Estate, 189 Misc. 210, 68 N.Y.S.2d 840 (Surr. Ct. 1947).

The Uniform Estate Tax Apportionment Act ("the Uniform Act") attempts to resolve conflicts between the federal estate tax provisions and a conflicting state apportionment statute. The Act states:

> If the liabilities of persons interested in the estate as prescribed by this act

After *Del Drago* state legislatures quickly passed various forms of apportionment statutes. To date, forty states have adopted some form of a statutory apportionment scheme.[40] Another four states rely on judicially mandated apportionment schemes.[41] Many of the states have adopted a version of the Uniform Estate Tax Apportionment Act.[42] Others have adopted the apportionment statute of the Uniform Probate Code, which is an adaptation of the Uniform Estate Tax Apportionment Act.[43] Seven jurisdictions, however, have not been swayed by the arguments supporting apportionment and continue to rely on the burden-on-the-residue rule.[44] In fact, some states adopting apportionment statutes later repealed them.[45]

III. ALTERNATIVE ESTATE TAX ALLOCATION SCHEMES

In the absence of specific instructions in the testator's will, states have devised three methods of determining which assets will bear the federal estate tax burden. The burden-on-the-residue rule[46] places the entire burden on the residuary estate, re-

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differ from those which result under the Federal Estate tax law, the liabilities imposed by the federal law will control and the balance of this Section shall apply as if the resulting liabilities had been prescribed herein.

REVISED UNIF. ESTATE TAX APPORTIONMENT ACT § 9 (1964). This provision has been omitted from the South Carolina statute.

40. *See infra* notes 57-58.

41. *Id.*

42. REVISED UNIF. ESTATE TAX APPORTIONMENT ACT (1964); UNIF. ESTATE TAX APPORTIONMENT ACT (1958). Fifteen states have adopted the original or revised version of the Uniform Act: Alaska (1958), Hawaii (1964), Idaho (1964), Maryland (1964), Michigan (1958), Montana (1958), New Hampshire (1958), North Carolina (1964), North Dakota (1964), Oregon (1964), Rhode Island (1964), Texas (1964), Vermont (1964), Washington (1964), and Wyoming (1958).

43. UNIF. PROBATE CODE § 3-916 (1986). Seven states have adopted the version of the Uniform Act contained at § 3-916 of the Uniform Probate Code: Colorado, Maine, Minnesota, Nebraska, New Mexico, South Carolina, and Utah. Arizona, Florida, and Kentucky adopted the Uniform Probate Code without § 3-916.

44. *See infra* note 46.

45. Oklahoma, Texas, and Maine have repealed apportionment statutes. Maine, however, enacted a new apportionment statute, which became effective on January 1, 1981. 1 [Estate & Gift] FED. TAXES (P-H) ¶ 120,025, at 140,249.

46. Three states have judicially retained the burden-on-the-residue rule. *See* Mazza v. Mazza, 475 F.2d 385 (D.C. Cir. 1973); Jackson v. Jackson, 217 Kan. 448, 536 P.2d 1400 (1975); *In re* Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641 (1953). The following states have codified the rule: ALA. CODE § 40-15-18 (1975); GA. CODE ANN. § 48-12-2 (1982); IOWA CODE § 633.449 (Supp. 1987) (Iowa does, however, protect property passing to the

gardless of the extent to which the probate assets contribute to the ultimate tax liability.[47] The rule is appealing for several reasons. By treating the federal estate tax as another claim against the estate, it permits the uniform administration of all estates. Also, since the tax need not be apportioned to and collected from each beneficiary, the rule promotes the prompt distribution of all the assets under the control of the personal representative.[48]

Opponents decry the common-law rule for four reasons. First, when the drafter of the will is either unfamiliar with the rule or is unaware of the size of the testator's non-probate estate, the rule purportedly fosters inequality and may distort the testator's intent.[49] *In re Gato's Estate*[50] and *In re Mellon's Estate*[51] illustrate this point. In both cases, an entire probate estate, was required to pay a federal estate tax liability made exorbitantly high by assets passing outside of the probate estate.

A second alleged problem with the burden-on-the-residue rule is that it increases estate tax liability when deductible gifts, such as a devise to a surviving spouse or a charitable devise, are made through the residuary clause of a will.[52] This increase occurs because a tax deduction is limited to the amount passing to the recipient of the deductible gift under the Code. If a deductible share is decreased by the entire amount of estate taxes, the taxable estate will grow by the amount of taxes paid, producing a greater estate tax liability.[53]

Third, the common-law rule is criticized because it allows

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surviving spouse from diminution, even if the surviving spouse receives a residuary bequest). Mississippi has adopted the rule by judicial decision and statute. Stovall v. Stovall, 360 So. 2d 679 (Miss. 1978); Estate of Torian v. First Nat'l Bank, 321 So. 2d 287 (Miss. 1975).

47. Note, *supra* note 8, at 706.

48. For an in-depth analysis of the advantages of the burden-on-the residue rule, see Wintermute, *supra* note 23, at 1142-43.

49. *Id.*

50. 276 A.D. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950). *Gato* concerned a probate estate of $180,000 that was completely exhausted because two trusts were included in the calculation of the gross estate for estate tax purposes.

51. 347 Pa. 520, 32 A.2d 749 (1943). *Mellon* concerned a probate estate of over $11 million. The taxable estate, however, exceeded $90 million due to several large gifts made in contemplation of death. The tax on the estate exceeded $37 million, completely exhausting the residuary estate as well as the entire probate estate.

52. Wintermute, *supra* note 23, at 1135 n.4.

53. *Id.*

for the reduction of certain residuary gifts that do not contribute to the estate tax liability.[54] Again, this problem occurs when the recipient of a deductible gift is a residuary beneficiary. Critics of the burden-on-the-residue rule believe that the reduction of a gift that does not contribute to the estate tax liability to obtain the necessary funds to pay that liability is incongruous in light of the federal policies favoring the deduction.[55]

Finally, a strong policy argument for the abrogation of the common-law rule can be based on the notion that a testator's family is usually the recipient of a residuary gift. By allowing the depletion of the residuary estate to be depleted by the amount of the estate's taxes, the rule may ultimately force the testator's dependents to rely on the state for support, an outcome clearly contrary to the testator's wishes.[56]

In response to these arguments, a majority of states have adopted a scheme of either partial[57] or total apportionment.[58] A

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54. *Id.*

55. *Id.*

56. *Id.* at 1144-45.

57. Arizona and Illinois have judicially adopted the rule of partial equitable apportionment. *See* Deetsch v. Deetsch, 312 F.2d 323 (7th Cir. 1963); Roe v. Estate of Farrell, 69 Ill. 2d 525, 372 N.E.2d 662 (1978). Four states have codified the rule. *See* FLA. STAT. ANN. § 733.817 (West 1983); MASS. GEN. LAWS ANN. ch., 65A, §§ 5, 5A, 5B (West 1969 & Supp. 1988); N.J. STAT. ANN. §§ 3B: 24-1 to -8 (West 1983); PA. STAT. ANN. tit. 20 §§ 3701-06 (Purdon Supp. 1987).

58. Total equitable apportionment has been enacted in 36 states by statute. *See* ALASKA STAT. § 13.16.610 (1985); ARK. CODE ANN. § 26-59-115 (1985); CONN. GEN. STAT. ANN. § 12-401 (West 1983); COLO. REV. STAT. § 15-12-916 (1987); DEL. CODE ANN. tit. 12, §§ 2901-06 (1987); HAWAII REV. STAT. §§ 236A-1 to -9 (1985); IDAHO CODE § 15-3-916 (1979); IND. CODE ANN. §§ 29-2-12-1 to -7 (Burns 1972 & Supp. 1987); LA. REV. STAT. ANN. §§ 9:2431 - :2438 (West 1965); ME. REV. STAT. ANN. tit. 18, § 3-916 (1981); MD. EST. & TRUSTS CODE ANN. § 11-109 (1974); MICH. COMP. LAWS ANN. §§ 720.11 - .21 (West 1968); MINN. STAT. ANN. § 524.3-916 (West Supp. 1987); MONT. CODE ANN. §§ 72-16-601 to -612 (1987); NEB. REV. STAT. §§ 77-2108 to -2112 (1986); NEV. REV. STAT. §§ 150.290-.390 (1986); N.H. REV. STAT. ANN. §§ 88-A:1 to :12 (1976); N.M. STAT. ANN. § 32A-3-916 (Spec. Pamphlet 1976); N.Y. EST. POWERS & TRUSTS LAW § 2-1.8 (McKinney 1981 & Supp. 1988); N.C. GEN. STAT. §§ 28A-27-1 to -9 (Supp. 1987); N.D. CENT. CODE § 30.1-20-16 (1976); OHIO REV. CODE ANN. § 2113.86 (Anderson Supp. 1987); OKLA. STAT. ANN. tit. 68, § 825 (West 1966 & Supp. 1987); OR. REV. STAT. §§ 116.303 - .383 (1984); R.I. GEN. LAWS §§ 44-23.1-1 to .1-12 (1980); S.C. CODE ANN. § 62-3-916 (Law. Co-op. 1987); S.D. CODIFIED LAWS ANN. 29-7-1 to -7 (1984); TENN. CODE ANN. §§ 30-2-614 (1984); TEXAS PROB. CODE ANN. § 322A (Vernon Supp. 1988); UTAH CODE ANN. § 75-3-916 (Supp. 1987); VT. STAT. ANN. tit. 32, §§ 7301- 09 (1981); VA. CODE ANN. §§ 64.1-160 to .1-165 (1987); WASH. REV. CODE ANN. §§ 83.110.010 to .904 (West Supp. 1988); W. VA. CODE § 44-2-16a (1982); WYO. STAT. §§ 2-10-101 to -116 (1977).

Kentucky and Missouri judicially adopted total equitable apportionment. Gratz v.

rule of partial apportionment partially relieves the residuary estate of the tax burden by requiring the recipients of non-probate property to pay their proportionate share of the estate tax; the estate tax attributable to the probate assets are still paid out of the residuary estate.[59] A rule of total apportionment relieves the residuary of the burden to a greater extent by also requiring the general devises,[60] specific devises,[61] and demonstrative legacies[62] passing under a will to pay their proportionate share of the estate tax liability.[63]

A plethora of arguments can be made for the total apportionment scheme. An initial equitable argument is that fairness dictates that each asset responsible for the estate tax liability pay its proportionate share of the tax.[64] Also, public policy seems to favor total apportionment because this scheme is more likely to prevent the depletion of the residuary estate, leaving sufficient assets to support the testator's family.[65] Finally, since the Uniform Probate Code and the Uniform Acts use total apportionment, an argument can be based on the laudable goal of obtaining national uniformity in this area.[66]

Proponents of the partial apportionment scheme rely on two arguments to show its superiority. First, they assert that, absent a specific provision in a will concerning the payment of estate taxes, a testator would want the general or specific devisees to obtain the property passing under the will without a con-

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Hamilton, 309 S.W.2d 181 (Ky. 1958); Carpenter v. Carpenter, 364 Mo. 782, 267 S.W.2d 632 (1954).

59. Note, *supra* note 8, at 707.

60. A general devise is a "[g]ift payable out of [the] general assets of the estate, not amounting to a bequest of [a] particular thing or money." *Id.* at 615. When a testator makes a general devise, he generally wants the beneficiary to receive value as opposed to a specific item. Gifts of money in a will are the most common form of general devises.

61. "A specific devise is a gift by will of a specific article or part of [the] testator's estate, which is identified and distinguished from all things of [the] same kind and which may be satisfied *only* by delivery of the particular things." BLACK'S LAW DICTIONARY 1254-55 (5th ed. 1979) (emphasis added).

62. A demonstrative legacy is a general legacy payable from a specific item, *e.g.*, "a gift of $10,000 payable from the sale of my stock." *See id.* at 389. If the specific source of the funds for paying the legacy is not available at the testator's death, other assets of the estate are sold to pay this general devise.

63. Note, *supra* note 8, at 707.

64. Wintermute, *supra* note 23, at 1145.

65. *Id.*

66. *Id.* at 1146.

comitant obligation to pay a portion of the federal estate tax. This argument is based on the notion that a testator, when making transfers outside of his probate estate, does not realize that these transfers will have an effect upon his estate tax liability. If the testator was aware of the tax consequences of these non-probate transfers, however, he would want this property to shoulder its proportionate share of the estate tax rather than placing this liability on the probate assets.

Specific and general bequests, unlike non-probate transfers, are generally based upon pretax property values. To diminish these gifts by charging each beneficiary with a share of the tax liability would be contrary to the testator's wishes.[67]

A second argument favoring partial apportionment is that it is a simpler system to administer when compared with total apportionment. Since property passing to general and specific devisees is not taxed, the personal representative is required to seek contribution only from the beneficiaries of non-probate assets. Similarly, a partial apportionment scheme creates fewer accounting difficulties. Although the accounting problem would appears to be a minor impediment, apportionment under a will containing an abundance of specific and general devises would be onerous, requiring the personal representative to calculate and account for each tax share until he pays it to the IRS.[68]

IV. ESTATE TAX APPORTIONMENT IN SOUTH CAROLINA

A. Common Law

Before South Carolina adopted a statutory estate tax apportionment scheme, a system of partial apportionment evolved under the common law. Early South Carolina cases formulated the general rule that the residuary estate is first applied to the payment of debts owed by the decedent's estate in the absence of specific instructions in the testator's will.[69] If the residuary

67. *Id.* at 1145.

68. *Id.* at 1146.

69. Patterson v. Cleveland, 165 S.C. 276, 163 S.E. 788 (1932), was the first South Carolina case to hold that a testator was free to designate which gifts should bear the burden of estate or inheritance taxes. For earlier cases holding that a testator may designate certain assets to satisfy the obligations of his estate, contrary to the common-law order of abatement, see Drayton v. Rose, 28 S.C. Eq. (7 Rich. Eq.) 328 (1855); Pell v.

estate is inadequate to meet these obligations, then general devises and specific devises, in that order, are applied to these obligations.[70] This general rule was subsequently applied to debts created by the federal estate tax in *Gaither v. United States Trust Co.*[71]

The South Carolina Supreme Court in *Myers v. Sinkler*[72] explicitly rejected the contention that the burden-on-the-residue rule, as established in *Gaither*, applied to assets passing outside of the probate estate. In *Myers* the testator conveyed several parcels of property to a trust, naming herself as the income beneficiary. According to the trust instrument, the income would go to her surviving sisters after her death. Upon their death, the income would go to certain of the testator's nieces and nephews living at the death of her last surviving sister.[73]

The decedent's will directed that all inheritance and estate taxes "shall be paid out of my residuary estate as an expense of administration, in order that all legacies and bequests made by my Will shall be free from the same."[74] Finding that this provision only evidenced an intent by the testator to charge the residuary estate with the portion of the estate tax generated by the probate assets,[75] the court characterized the issue as follows:

> In the absence of statute or express direction in either the trust deed or the will, should the ultimate burden of estate and inheritance taxes be borne solely by the residuary probate estate, or notably, under the principle of equitable apportionment, by both the probate and the non-probate estates?[76]

After noting that a finding either way could be supported by the law of other jurisdictions,[77] the court concluded that non-probate assets were required to bear their share of the federal estate

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Ball's Ex'rs, 17 S.C. Eq. (Speers Eq.) 518 (1844).

70. *See* Brown v. James, 22 S.C. Eq. (3 Stroh. Eq.) 24 (1849); Duncan v. Tobin, 13 S.C. Eq. (Dud. Eq.) 161 (1838); Warley v. Warley, 8 S.C. Eq. (Bail. Eq.) 397 (1831). The current order of abatement in South Carolina is codified at S.C. CODE ANN. § 62-3-902 (Law. Co-op. 1987).

71. 230 S.C. 563, 97 S.E.2d 24 (1957).

72. 235 S.C. 162, 110 S.E.2d 241 (1959).

73. *Id.* at 166, 110 S.E.2d at 242.

74. *Id.*

75. *Id.* at 167-68, 110 S.E.2d at 243.

76. *Id.* at 167, 110 S.E.2d at 242.

77. *Id.* at 170-73, 110 S.E.2d at 244-46.

tax.[78] The court reasoned that equitable apportionment was superior to a burden-on-the-residue rule for two reasons. First, for federal estate tax purposes, a taxable estate is composed two separate estates—probate and non-probate.[79] Second, an equitable apportionment rule would most often carry out the testator's intent since the testator would not contemplate that non-probate assets would be included as part of his estate for tax purposes or that the tax burden of these assets would be borne by the residuary beneficiaries.[80]

Subsequent cases noted that the rule of equitable apportionment between probate and non-probate assets could be varied by a provision in the will directing that estate taxes be paid from specific assets.[81] *Dial v. Ridgewood Tuberculosis Sanatorium* concerned a will provision stating that all of the testatrix's federal estate taxes be paid out of her residuary estate. Overruling a lower court decision requiring that only the portion of estate taxes attributable to the probate assets be paid out of the residuary estate, the court held that the entire tax was payable from the residuary estate.[82] The court did not rely solely on the provision in the will but looked to extrinsic evidence to conclude that the testator intended that her entire federal estate tax liability be borne by the residuary estate.[83]

B. Statutory Law

In 1961 South Carolina enacted an estate tax in Title 12 of the South Carolina Code, which replaced the state's inheritance tax enacted in 1922.[84] Section 12-15-1540 of that title addressed how the tax burden was to be allocated.[85] It stated:

> Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists

78. *Id.* at 173-74, 110 S.E.2d at 246.
79. *Id.*
80. *Id.*
81. Dial v. Ridgewood Tuberculosis Sanatorium, 240 S.C. 64, 124 S.E.2d 598 (1962).
82. *Id.* at 72, 124 S.E.2d at 601.
83. *Id.* at 74, 124 S.E.2d at 602.
84. S.C. CODE ANN. §§ 12-15-10 to -1610 (Law. Co-op. 1976 & Supp. 1987). In the 1952 South Carolina Code, the state's inheritance tax was codified at S.C. CODE ANN. §§ 65-451 to -529 (1952) (repealed 1961).
85. S.C. CODE ANN. § 12-15-1540 (Law. Co-op. 1976) (repealed 1987).

> of the value of property included in the gross estate under sections 12-15-40 or 12-15-230 by reason of their reference to the provisions of sections 2034 to 2044, inclusive, of the Internal Revenue Code of 1954, as amended, the executor shall be entitled to recover from the person receiving or in possession of such property such portion of the total tax paid as the value of such property bears to the sum of the taxable estate. . . .[86]

Since sections 2034 through 2044[87] of the Code concerned those assets passing outside of a testator's will, section 12-15-1540 preserved the common-law partial apportionment rule as articulated in *Myers*, at least with regard to the South Carolina estate tax. A 1969 amendment to Title 12 made section 12-15-1540 applicable to the federal estate tax as well.[88]

Although section 12-15-1540 sufficiently informed South Carolinians which assets of the testator's probate and non-probate estates would bear the ultimate burden of estate taxes if the testator did not make such a designation in the will, it was woefully deficient in addressing the myriad of issues that from time to time present themselves in the estate tax apportionment context. The section did not resolve, for example, issues such as the apportionment of interest and penalties, the tax on a life estate given at the testator's death, and the tax liability of a deductible share passing under a will.

To address these unresolved issues, the South Carolina General Assembly passed a comprehensive estate tax apportionment statute[89] ("the statute") in 1987 as part of the Probate Code.[90]

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86. *Id.*

87. The non-probate transfers referred to in these sections of the Code and incorporated into section 12-15-1540 are the following: (1) § 2034, dower and curtesy interests; (2) § 2035, transactions in contemplation of death; (3) § 2036, transfers with a retained life estate; (4) § 2037, transfers taking effect at death; (5) § 2038, revocable transfers; (6) § 2039, annuities; (7) § 2040, joint interests; (8) § 2041, powers of appointment; (9) § 2042, proceeds of life insurance; (10) § 2043, transfers for insufficient consideration; and (11) § 2044, prior interests.

88. S.C. CODE ANN. § 12-15-1550 (Law. Co-op. 1976) (repealed 1987). This provision states: "The provisions of § 12-15-1540 shall apply to the Federal estate tax levied under the Internal Revenue Code of 1954, as amended."

89. The estate tax apportionment provisions of the Probate Code are codified at S.C. CODE ANN. § 62-3-916 (Law. Co-op. 1987).

90. South Carolina Probate Code, 1986 S.C. Acts 34. The South Carolina Probate Code is codified at S.C. CODE ANN. §§ 62-1-100 to -7-602 (Law. Co-op. 1987) and became effective on July 1, 1987. For a history of the Probate Code, see Le Blanc, *The Proposed South Carolina Probate Code*, 36 S.C.L. REV. 511 (1985). For a comparison of the South

The statute attempts to grapple with the complexities of estate tax apportionment not addressed by section 12-15-1540. With several minor changes, the statute follows the Revised Uniform Estate Tax Apportionment Act ("the Revised Uniform Act"),[91] which the National Conference of Commissioners on Uniform State Laws approved in 1964.[92] The remainder of this Note will analyze the apportionment provisions of the Probate Code and the effect of these provisions on the law of estate tax apportionment in South Carolina.

V. The New South Carolina Estate Tax Apportionment Statute

A. Apportionment Scheme

The South Carolina estate tax apportionment provisions

Carolina Probate Code to prior South Carolina law, see Medlin, *Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law*, 38 S.C.L. Rev. 611 (1987).

91. Revised Unif. Estate Tax Apportionment Act (1964).

92. The original version of the Uniform Act was passed by the National Conference of Commissioners on Uniform State Laws in August 1958. It gained immediate approval from the American Bar Association. The Uniform Act was revised in 1964 to provide for payment out of the residue of the estate when payment could not be collected from a person required to pay the tax. *See* Scoles & Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 Minn. L. Rev. 907, 917 (1959); Note, *supra* note 8, at 713-14 n. 55.

The eight substantive and five procedural sections of the Uniform Act are not all contained in the Uniform Probate Code's estate tax apportionment provisions. The Uniform Probate Code omits all the procedural sections. Four major substantive provisions of the Uniform Act have also been changed by the Uniform Probate Code. First, the Uniform Probate Code does not provide for payment out of the residue of the estate when payment cannot be collected from a person required to pay the tax, as provided by the 1964 revision of the Uniform Act, but it reallocates the apportioned share of the estate tax to all probate and non-probate beneficiaries whose gifts contribute to the estate tax liability. Second, the Uniform Probate Code has no provision for the apportionment of expenses incurred in calculating and collecting the apportioned share of the tax, as the Uniform Act does. Third, the personal representative under the Uniform Probate Code can determine apportionment on his own initiative, instead of through a court order, since judicial determination of apportionment is not required. Finally, the Uniform Act attempts to grapple with one problem involved in multistate estate administration, allowing a personal representative to seek contribution from a nonresident beneficiary only if the jurisdiction of the decedent affords a substantially similar remedy. Revised Unif. Estate Tax Apportionment Act § 8 (1964). For a criticism of this section of the Uniform Act, see Scoles & Stephens, *supra*, at 935. For a listing of differences between the Uniform Act and the Uniform Probate Code, see Note, *supra* note 8, at 714-15 n.58.

contained in the Probate Code apportion the estate tax among all persons receiving probate and non-probate assets.[93] This is a drastic change from prior law, which apportioned the estate tax only to non-probate property and left the residuary estate to bear the tax liability for general devises, specific devises, and demonstrative devises.[94] Devises outside the residuary estate, no matter how small, now are forced to bear their share of the tax liability unless exonerated by a contrary will provision.[95]

B. Computation

The statute provides for the apportionment of taxes among probate and non-probate assets as follows:[96]

$$\frac{\text{value of an individual's interest in the estate}}{\text{total value of the interests of the tax of all persons interested in the estate}} \times \text{total tax} = \text{recipient's share}$$

This provision is compatible with the two federal statutory apportionment provisions addressing life insurance proceeds and general powers of apportionment because each uses this formula

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93. S.C. CODE ANN. § 62-3-916(b) (Law. Co-op. 1987). The language of § 62-3-916(b), which apportions the estate tax among both probate and non-probate assets, is as follows: "[T]he tax shall be apportioned among all persons interested in the estate." Scoles & Stephens, *supra* note 92, at 918. This is further substantiated by the Reporter's Comment to § 62-3-916(b), which states the following: "Section 3-916(b) establishes a true apportionment of estate taxes among all takers, whether they be probate or non-probate, unless a will states otherwise."

94. *See* S.C. CODE ANN. § 12-15-1540 (Law. Co-op. 1976) (repealed 1987).

95. A few commentators have questioned the propriety of apportioning the estate tax, even in a total apportionment scheme, when small bequests are involved. *See* Susman & Fourtieq, *Apportionment of Death Taxes: A Comprehensive Survey with Proposed Statute*, 45 TEXAS L. REV. 1348, 1396-97 (1967) (suggesting that certain specific devises comprising less than 10% of the taxable estate should not be required to pay a share of the tax). *Contra* Comment, *supra* note 4, at 754 ("In a large estate, however, this provision could operate as a loophole allowing a sizable bequest to pass tax free, while increasing the amount of tax to be paid by other beneficiaries."). A provision excluding small devises from apportionment is based on an assumption that a decedent probably intends that a small devise should pass to a beneficiary without being diminished by its share of the estate tax. *Id.*

96. Scoles & Stephens, *supra* note 92, at 918. For an interesting look at other apportionment methods, see Mitnick, *State Legislative Apportionment of the Federal Estate Tax*, 10 MD. L. REV. 289, 312-17 (1949).

to determine the recipient's tax burden.[97] The statute further allows the personal representative to apportion the taxes on his own initiative since a judicial order allowing apportionment is not required.

C. *Contrary Will Provisions*

The statute allows the estate tax to be apportioned by the statutory formula "unless the will otherwise provides."[98] Although this requirement appears straightforward, the statute is silent concerning what language is required to overcome its operation.[99] Consequently, in those states that use a similar statute, courts have had to decide when a will provision apportioning estate taxes overrides the statute.[100]

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97. Scoles & Stephens, *supra* note 92, at 918. Under I.R.C. § 2207A, the formula does not apply to property for which an election to qualify for the marital deduction pursuant to I.R.C. § 2056(b)(7) has been made. The personal representative under this section "is empowered to recover an amount equal to the excess of the total amount of estate tax payable by the estate, less the amount which would have been payable had the qualified terminable property ('Q-tip property') not been included in the gross estate of the decedent." Mauer, *Estate Tax Apportionment*, 14 COLO. LAW. 208, 209 (1985).

98. S.C. CODE ANN. § 62-3-916(b) (Law. Co-op. 1987).

99. Several commentators have addressed the necessity of an apportionment statute having a standard will provision that will overcome its operation. *See* Note, *Statutory Apportionment of Federal Estate Taxes*, 62 HARV. L. REV. 1022, 1025-26 (1949); Note, *Proposal for Apportionment of the Federal Estate Tax*, 30 IND. L.J. 217, 229 (1955). For an example of suggested provisions that may overcome the operation of an apportionment statute, see Wintermute, *supra* note 23, at 1162-66.

Even a will containing a general prohibition against apportionment may not be sufficient to avoid apportionment with regard to those assets covered under the Code's apportionment provisions—general powers of appointment, life insurance proceeds, and Q-TIP property. At least one court has held that before a will can preclude apportionment for property covered under the Code, the will must specifically reference this property. *See In re* Will of Gordon, 134 Misc. 2d 247, 510 N.Y.S.2d 815 (Surr. Ct. 1986). North Carolina's apportionment statute provides that a general direction in the will that taxes shall not be apportioned is not sufficient to overcome the statutory requirement of apportionment with respect to life insurance proceeds, powers of appointment property, and Q-TIP property. These assets must be specifically exonerated in a will provision not to apportion before apportionment will be precluded. N.C. GEN. STAT. § 28A-27-2(b) (Supp. 1987).

100. Courts in other jurisdictions have held that, in the absence of an unambiguous provision in a will not to apportion estate taxes, the existence of an apportionment statute creates a strong presumption in favor of apportionment of the tax and that those who argue against apportionment must bear the burden of proof. *See, e.g., In re* Pepper's Estate, 307 N.Y. 242, 120 N.E.2d 807 (1954); *In re* Tropp's Will, 67 Misc. 2d 819, 324 N.Y.S.2d 518 (Surr. Ct. 1971). Conflicts are resolved in favor of apportionment. *See, e.g.*, Estate of Leonard, 9 A.D.2d 1, 189 N.Y.S.2d 422 (1959); *In re* Wheeler's Will, 19 Misc.

Under the statute, a decedent can overcome the apportionment formula *only* by a provision in the will.[101] Attempts to change the operation of the statute by nontestamentary means are ineffective. Thus, a settlor cannot exonerate a trust from tax liability or allocate the tax burden among its beneficiaries through a provision in a trust agreement.[102] Also, a decedent who, prior to his death, transfers property that will be contained in the taxable estate cannot contractually guarantee a transferee that he will exclude that property from tax liability.[103]

D. Exceptions to the Statutory Formula

1. Income Beneficiaries and Life Tenants

Income and life interests, as opposed to principal and remainder interests, created special problems under earlier apportionment statutes. Although both contributed to the estate tax liability, it was almost impossible to devise an acceptable formula to apportion fairly the tax between the present and future interests.[104]

Section (f) of the statute requires that the corpus or the remainder interest bear the estate tax liability for both interests.[105] Most commentators believe this result is fair, given the complexities of apportioning the tax between the two interests and the policies supporting the rule.[106] A contrary rule would cause delays in closing estates and could require that an income beneficiary pay a portion of the estate tax from funds that had been earmarked for his support—a result clearly contrary to the decedent's intent.[107] Also, since the estate tax payment will reduce the corpus used to generate the income, the income recipient indirectly will contribute to the tax through decreased income payments.[108]

2d 335, 186 N.Y.S.2d 134 (Surr. Ct. 1959).

101. Scoles & Stephens, *supra* note 92, at 918.

102. Note, *supra* note 8, at 732-33.

103. *Id.*

104. Scoles & Stephens, *supra* note 92, at 933.

105. S.C. CODE ANN. § 62-3-916(f) (Law. Co-op. 1987).

106. Note, *supra* note 8, at 721.

107. *Id.*

108. *Id.* This argument is inapplicable if the beneficiary receives a specific dollar amount, as opposed to all or a percentage of the income from a fund, since payment of

2. *Shares Qualifying for a Deduction*

The drafters of the statute clearly intended that property qualifying for a deduction under the Code should not be apportioned a share of the estate tax.[109] This result is fair since these interests do not increase the estate's tax liability.[110] Furthermore, if taxes are imposed on these deductible interests, reducing the value of the assets passing to the recipient, the estate tax will be higher because only the value of the assets passing to the beneficiary can qualify for a deduction.[111]

Section (e)(1) plainly indicates that property receiving a deduction should not be apportioned a share of the tax liability: "In making an apportionment, allowances shall be made for any . . . deductions and credits allowed by the law imposing the tax."[112] According to at least one commentator, however, the apportionment formula can be read to require the apportionment of taxes to these deductible interests.[113]

Under the statutory formula, the tax is apportioned to all "persons interested in the estate."[114] The statute defines "persons interested in the estate" as "any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the *decedent's estate.*"[115] The amount apportioned is "the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate."[116]

Since individuals and organizations receiving a deductible gift are not excluded from the definition of a person interested in the estate, a literal reading of the apportionment formula requires that the tax be apportioned to these deductible shares.[117] This result could have been avoided if the drafters had defined

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the estate tax in this situation will not affect the amount of money paid to the beneficiary.

109. S.C. CODE ANN. § 62-3-916(e)(1) (Law. Co-op. 1987).
110. Comment, *supra* note 4, at 752.
111. *See supra* notes 52-53 and accompanying text.
112. S.C. CODE ANN. § 62-3-916(e)(1) (Law. Co-op. 1987).
113. Note, *supra* note 8, at 736 n.160.
114. S.C. CODE ANN. § 62-3-916(b) (Law. Co-op. 1987).
115. *Id.* § 62-3-916(a)(3) (emphasis added).
116. *Id.* § 62-3-916(b).
117. Note, *supra* note 8, at 736 n.160.

"person interested in the estate" as "any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's [taxable] estate."[118]

If the statute is interpreted to exclude from tax liability property qualifying for a deduction, as was the intent of the drafters, a deductible interest may still have to bear a share of the tax burden under certain circumstances. The first of these situations occurs, as previously discussed, when a remainder interest consists of assets that qualify for a deduction.[119] Although this result appears incongruous given the federal policies underlying such an exemption, it is justified because of the aforementioned practical problems of apportioning the tax in this situation.

A second situation in which a deductible interest may have to pay a portion of the tax is when a surviving spouse elects to take an elective or forced share.[120] The issue is whether the elective share should be computed on the decedent's estate before or after the estate is reduced by estate taxes.[121] If the elective share is computed after estate taxes have been deducted from the net estate, the surviving spouse essentially is charged with a portion of the tax burden.[122] Since the surviving spouse's elective share qualifies for the marital deduction and generates no tax liability, this result would again be inequitable.

Unfortunately, the statute does not address the surviving spouse's elective share. In states that have adopted a statutory apportionment scheme, however, the arguments are persuasive

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118. S.C. CODE ANN. § 62-3-916(a)(3) (Law. Co-op. 1987).

119. S.C. CODE ANN. § 62-3-916(f) (Law. Co-op. 1987); Comment, *supra* note 4, at 752.

120. The concept of a forced or elective share is contained in the South Carolina Probate Code at §§ 62-2-201 to -207. These sections provide that a surviving spouse is entitled to one-third of the probate estate of a deceased spouse. If a surviving spouse does not receive one-third of the decedent's probate assets under the will, he or she may elect to take a one-third share as provided by the statute. The surviving spouse's forced share, however, will be reduced by the assets received as a part of the probate estate. Under the elective share provisions of the Probate Code, this right can only be enforced against property passing under the decedent's will and not against property passing outside of the will. Also, property received by a surviving spouse through non-probate transfers is not counted in determining whether the surviving spouse has received his or her appropriate share of the decedent's estate. *See* Medlin, *supra* note 90, at 661.

121. Kahn, *supra* note 39, at 1499.

122. *Id.* at 1500.

for computing the elective share before the net estate is reduced by estate taxes.[123] Because the statute specifically exempts shares qualifying as a deduction,[124] this provision should encompass a surviving spouse's elective share. Also, the South Carolina General Assembly's decision to adopt an apportionment statute indicates its desire to apportion taxes on an equitable basis. Since an elective share does not generate an estate tax liability, equity dictates that the share not be reduced by that liability.[125]

These arguments will not prevail if the statute providing for the elective share specifically requires that the net estate be reduced by estate taxes before the elective share is taken.[126] Under the Probate Code, which provides for a surviving spouse's elective share, the spouse is entitled to the elective share after the reduction of proper claims and funeral and administrative expenses.[127] Because the definitional section of the Probate Code states that a claim does not include estate and inheritance taxes,[128] an argument can be made that the statute mandates that a surviving spouse taking an elective share be given the share prior to any reduction in the net estate for estate taxes. Even if this particular interpretation is not accepted, it seems reasonable that a court would reach this conclusion based upon rational analysis and equitable principles.

3. Receipt of Periodic Payments

Often a decedent will contract with a third party to require that the third party make payments to a designated beneficiary after the decedent's death. Traditionally, this situation arises with installment payments under an employee benefit plan[129] or when a life insurance contract pays the beneficiary periodic payments.[130] Since such property adds to the decedent's taxable estate by the full value of the contract, some state apportionment

123. *Id.* at 1515.

124. S.C. CODE ANN. § 62-3-916(f) (Law. Co-op. 1987).

125. Kahn, *supra* note 39, at 1515. *Contra* Weinberg v. Safe Deposit & Trust Co., 198 Md. 539, 85 A.2d 50 (1951) (dissenting widow's share chargeable with estate taxes over a statutory rule of apportionment).

126. Kahn, *supra* note 39, at 1512.

127. S.C. CODE ANN. § 62-2-202 (Law. Co-op. 1987).

128. *Id.* § 62-1-201.

129. I.R.C. § 2042.

130. *Id.* § 2039(a)-(c).

schemes statutorily require that the third party payor pay the tax attributable to the beneficiary's interest. The obvious justification for such a provision is to shift the initial tax payment to the party with the means to pay the tax. The third party would then reduce the amount of the installment payments to compensate for the initial outlay of the tax.[131]

Although the statute does not directly address this issue, it is unlikely that the third party would be obligated to pay the beneficiary's share of the tax.[132] The statute provides that the personal representative has the right to recover the tax *only* from a "person interested in the estate."[133] The statutory definition of "persons interested in the estate" does not seem broad enough to cover these kinds of third party payors.[134]

E. Apportionment of Other Items Under the Statute

1. Uncollectible Shares

As previously noted, the Revised Uniform Act charges uncollectible shares against the residuary estate.[135] Although this method is convenient administratively, it results in the diminution of a deductible gift when a surviving spouse or charity is the devisee of a residuary gift.[136] South Carolina changed this result by adopting the Uniform Probate Code's version of the apportionment statute. Under the Probate Code, uncollectible shares are reallocated among individuals who initially are charged a share of the tax.[137]

2. Interest and Penalties

The statute apportions interest and penalties imposed by the Code in the same manner that it apportions the estate tax.[138]

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131. Note, *supra* note 8, at 721.

132. *Id.*

133. S.C. CODE ANN. § 62-3-916(b) (Law. Co-op. 1987).

134. " 'Persons interested in the estate' means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate." *Id.* § 62-3-916(a)(3).

135. *See supra* note 92.

136. Note, *supra* note 8, at 731-32.

137. S.C. CODE ANN. § 62-3-916(g) (Law. Co-op. 1987).

138. *Id.* § 62-3-916(c)(2).

This requirement, however, is subject to two major exceptions. Under section (e)(2), interest and penalties are not apportioned when the application of the general rule would be unfair: "If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable."[139] This section may be used to hold a single beneficiary liable for interest and penalties when his delay causes the additional assessment by the IRS.[140]

A second exception to the general rule concerns the assessment of penalties and interest brought about by the delay of the personal representative.[141] A court may hold the personal representative liable for the entire amount of interest and penalties if his delay caused the assessment by the IRS.[142]

3. Credits

Section (e) of the statute addresses the apportionment of several types of estate tax credits allowed under the Code.[143] While some of these credits inure directly to the benefit of specific beneficiaries, others benefit all the beneficiaries subject to apportionment.[144]

Under section (e)(3) of the statute, any credit for property previously taxed or any credit for foreign estate or gift taxes paid by the decedent or the decedent's estate inures to the proportionate benefit of all persons subject to apportionment, regardless of which estate assets generate the credit.[145] The statute does not address the situation in which the tax that gives rise to a credit has been paid by a particular beneficiary.

Section (e)(4) of the statute concerns credits for inheritance, succession, and estate taxes. Any credit generated by these types

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139. *Id.*

140. Note, *supra* note 8, at 727.

141. S.C. CODE ANN. § 62-3-916(c)(3) (Law. Co-op. 1987).

142. Note, *supra* note 8, at 727-28.

143. These credit are: Unified Credit, I.R.C. § 2010; Credit for State Death Taxes, I.R.C. § 2011; Credit for Gift Tax, I.R.C. § 2012; Credit for Tax on Prior Transfers (credit for estate tax paid on transfer of property to the decedent from a person who dies within 10 years before or 2 years after the death of the decedent), I.R.C. § 2013; Credit for Foreign Death Taxes, I.R.C. § 2014.

144. *See* Scoles & Stephens, *supra* note 92, at 926-33.

145. S.C. CODE ANN. § 62-3-916(e)(3) (Law. Co-op. 1987).

of state death taxes, with respect to property includable in the estate, inures to the benefit of the person or interest chargeable with the payment to the extent the credit reduces the tax.[146]

4. Nontax Expenses

Nontax expenses are those that the personal representative incurs in his efforts to apportion and collect the tax. Although both the Uniform Act and the Revised Uniform Act apportion these expenses in the same manner that the tax is apportioned,[147] the Uniform Probate Code, and consequently the statute, do not address this issue.[148]

F. Collection of the Apportioned Shares

1. Collection and Contribution

The statute envisions three situations in which apportionment will be used.[149] First, the personal representative is entitled to withhold from the property distributable to each individual beneficiary an amount necessary to satisfy each beneficiary's tax liability.[150] Often, however, the distributable property possessed by the personal representative will be insufficient to meet a beneficiary's estate tax liability. This insufficiency occurs frequently when a beneficiary has received a large gift outside of the probate estate. In this instance, the personal representative may retain the beneficiary's property to coerce him to pay his share of the tax.[151] If the personal representative does not possess any property of a beneficiary to whom part of the tax is apportioned, he may still recover from the beneficiary his apportioned share of the tax.[152]

The statute recognizes the possibility that the personal representative may not be able to allocate and collect all of the es-

146. *Id.*
147. *See supra* note 92.
148. Note, *supra* note 8, at 729-30.
149. *See* Scoles & Stephens, *supra* note 92, at 925.
150. S.C. CODE ANN. § 62-3-916(d)(1) (Law. Co-op. 1987).
151. Scoles & Stephens, *supra* note 92, at 934.
152. S.C. CODE ANN. § 62-3-916(d)(1) (Law. Co-op. 1987).

tate tax liabilities before the tax payment is due.[153] Under these circumstances, the personal representative may need to pay the tax from the residuary estate or any other property in his possession.[154] In some states, the personal representative may have a right to acquire from the beneficiary a sum equal to the beneficiary's apportioned tax share plus the interest accrued on this sum as compensation to the beneficiary who has lost the use of his funds during this period.[155]

If the distributable property of a beneficiary is insufficient to meet his liability and the beneficiary cannot or will not voluntarily remit his share to the personal representative, the personal representative has an affirmative duty under section (g) of the statute to institute a judicial proceeding to seek contribution from the noncontributing party.[156] The personal representative must wait at least three months after the final determination of the tax liability to sue for recovery of the apportioned share.[157] If the personal representative sues within a reasonable time af-

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153. Under §§ 2206, 2207, and 2207A of the Code, it appears that a personal representative must pay all the tax from the funds at his disposal before allocation to and collection from the other beneficiaries of the estate. States that have adopted the Uniform Probate Code appear to permit apportionment and collection prior to payment under § (d)(1). This practice presumably will improve liquidity by allowing beneficiaries to contribute liquid assets to the personal representative as opposed to requiring the sale of certain nonliquid assets in the estate. Pennell, *Tax Payment Provisions and Equitable Apportionment: Drafting to Span Legal Voids*, 22 INST. ON EST. PLAN. ¶ ___ (1988) (to be published).

Under the Uniform Probate Code, it is slightly easier for a personal representative to apportion and collect the tax during this time. Under this version, the personal representative can determine apportionment by his own initiative, instead of through a court order, since a judicial determination of apportionment is not required: "The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose, *may* determine the apportionment of the tax." S.C. CODE ANN. § 62-3-916(c)(1) (Law. Co-op. 1987) (emphasis added). Under the Uniform Act, apportionment must be obtained by court order. Note, *supra* note 8, at 714-15 n.58.

154. Pennell, *supra* note 153, at ¶ ___; Note, *supra* note 8, at 730 n.132.

155. Neither the Uniform Acts nor the Uniform Probate Code make a provision for the payment of interest to beneficiaries who lose income when the personal representative uses their property to pay the taxes allocated to other property in the taxable estate. Absent a statutory provision, the courts apparently have split on this issue. *See generally*, Annotation, *Remedies and Practice Under Estate Tax Apportionment Statutes*, 71 A.L.R.3D 371, 437 (1976). Because courts have held the tax due from a beneficiary to be an unliquidated obligation until the apportioned share is determined by the court or the personal representative, some courts have allowed the personal representative the right to retain interest only from the time the apportioned share has been ascertained. *Id.*

156. S.C. CODE ANN. § 62-3-916(g) (Law. Co-op. 1987).

157. *Id.*

ter this period, the statute exonerates him from liability for estate taxes that may become uncollectible during this period.[158]

2. *Requirement of a Bond*

Section (d)(2) of the statute allows the personal representative to distribute property to a beneficiary prior to a final apportionment of the tax. The beneficiary, however, must post a bond with the personal representative sufficient to cover the amount of the tax liability.[159]

G. Conflict of Laws

The apportionment of estate taxes by a personal representative can be extremely difficult in the multistate context. When a decedent, domiciled in an apportionment jurisdiction, makes a non-probate transfer that affects the estate's tax liability to an out-of-state beneficiary, a state's entire apportionment scheme may be threatened. Unless the personal representative can compel the nonresident beneficiary to pay his apportioned share of the tax, the remaining probate and non-probate beneficiaries may be forced to contribute the nonresident beneficiary's share, substantially diminishing the value of their transfers from the decedent.[160]

The personal representative has several means of obtaining the nonresident beneficiary's apportioned share. If the non-probate assets are covered by sections 2206, 2207, or 2207A of the Code, federal law requires that these assets pay their proportionate share of the estate tax liability, regardless of the apportionment policies of the nonresident beneficiary's state.[161] If the non-probate transfers are of a type not covered by the Code, such as joint tenancies with rights of survivorship, gifts, or inter

158. *Id.*

159. S.C. CODE ANN. § 62-3-916(d)(2) (Law. Co-op. 1987).

160. As previously noted, uncollectible shares are allocated against the residuary estate in states that have adopted the Revised Uniform Act. REVISED UNIF. ESTATE TAX APPORTIONMENT ACT § 4 (1964). In South Carolina uncollectible shares are reallocated among those individuals who are apportioned a share of the tax. S.C. CODE ANN. § 62-3-916(g) (Law. Co-op. 1987).

161. Scoles, *Estate Tax Apportionment in the Multi-State Estate*, 5 INST. ON EST. PLAN. ¶ 71.717.1 (1971) ("These federal apportionment statutes apply to all estates wherever located so there are few conflicts problems that relate to apportionment.").

vivos trusts, the personal representative may seek apportionment by other methods.

If the nonresident beneficiary of non-probate property is also a beneficiary of certain probate property that passes through the hands of the personal representative, the personal representative has a right under section (d)(1) of the statute to set off the beneficiary's tax liability against this probate property.[162] If the probate property is not sufficient to offset the tax liability or the nonresident beneficiary did not receive any probate assets under the testator's will, the personal representative ultimately must initiate a contribution action to compel the nonresident beneficiary to pay his apportioned share.[163]

Unless the nonresident beneficiary voluntarily submits to the jurisdiction of the probate court administering the estate, the court cannot order the beneficiary to pay his apportioned share.[164] To obtain an order compelling the payment of the apportioned share of the tax, a personal representative, if he can obtain jurisdiction,[165] may be forced to institute a suit against

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162. S.C. CODE ANN. § 62-3-916(d)(1) (Law. Co-op. 1987).

163. *Id.* § 62-3-916(g).

164. A judgment obtained against a nonresident beneficiary who submits to the jurisdiction of a foreign probate court is enforceable in the beneficiary's domicile under the full faith and credit clause. *See generally* R. LEFLAR, L. MCDOUGAL & R. FELIX, AMERICAN CONFLICTS LAW § 73 (4th ed. 1986). Also, if the nonresident beneficiary can be served within the decedent's domicile, the probate court administering the estate may be able to demand contribution from the nonresident beneficiary. *See* Humphrey v. Langford, 246 Ga. 732, 733, 273 S.E.2d 22, 23 (1980) ("[W]hen an individual is personally served within the state, we are talking about actual presence. Minimum contacts analysis is not necessary.").

165. The issue of whether a personal representative can obtain jurisdiction over takers of non-probate property located in other jurisdictions is a complex one, turning on both federal and state law. From a state law perspective, one noted author stated that "[a]bsent a statutory right to bring an action, it is literally anyone's guess whether a personal representative will successfully obtain jurisdiction over a recalcitrant non-probate beneficiary." Pennell, *supra* note 153, at ¶ ___.

In South Carolina, as in some other states that have adopted the Uniform Probate Code, a domiciliary foreign personal representative might maintain such an action under Article 4 of the Probate Code. Although these Article 4 provisions clearly were enacted to allow a foreign personal representative to pursue foreign assets of the testator which should be included in the testator's estate, the language of Article 4 is arguably broad enough to include a contribution action by a foreign personal representative against an in-state beneficiary for estate taxes.

Under Article 4, a foreign personal representative can come into South Carolina and voluntarily collect obligations from "any person indebted to the estate of the nonresident decedent." S.C. CODE ANN. § 62-4-201 (Law. Co-op. 1987). If the foreign personal representative cannot collect the obligation voluntarily, a suit against a debtor of the estate

the nonresident beneficiary in the beneficiary's domicile. A suit in the nonresident beneficiary's domicile, however, does not guarantee that the personal representative will retrieve the beneficiary's share of the estate tax obligation. The foreign jurisdiction initially must determine whether its law or the law of the testator's domicile governs the controversy.[166] Although some

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can be maintained if two conditions are satisfied: (1) no local administration is being conducted or no petition to conduct such an administration is pending, and (2) the foreign personal representative files "with a court in this State in a county in which property belonging to the decedent is located, authenticated copies of his appointment, the will, if any, and of any official bond he has given." *Id.* § 62-4-204. A foreign personal representative who meets these requirements "may exercise as to assets in this state all powers of a local representative." *Id.* § 62-4-205. Since a local representative is empowered under § 62-3-916(d)(1) to seek contribution of estate taxes from a beneficiary receiving a non-probate transfer, a foreign personal representative also would be granted this power under Article 4.

Under § (8)(b)(1) of the Uniform Act and the Revised Uniform Act, a nonresident personal representative can bring a suit for apportionment in a foreign jurisdiction if the decedent's domicile also allows an apportionment action by a foreign personal representative. At least one author has suggested that the denial of this right on the basis of reciprocity may violate the full faith and credit clause of the Constitution. Scoles & Stephens, *supra* note 92, at 935.

Both § (8)(b)(2) of the Uniform Act and the Revised Uniform Act permit an action to enforce contribution, regardless of reciprocity, if the apportionment is authorized by Congress. While this provision authorizes contribution suits by foreign personal representatives for §§ 2206, 2207, and 2207A transfers, even without an authorizing state statute, the issue has been broached whether § 2205 extends a federal cause of action to beneficiaries who have paid a portion of a nonresident beneficiary's estate tax liability. Scoles & Stephens, *supra* note 92, at 963. The pertinent portion of § 2205 states:

> If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor. . ., such person shall be entitled to reimbursement. . . by a just and equitable contribution by the persons. . . whose interest is subject to equal or prior liability for the payment of taxes. . . .

I.R.C. § 2205.

166. *See* Comment, *supra* note 4, at 750-71. *See generally* Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261 (1955). Professor Scoles notes that the question of whether to apply the apportionment statute of the forum state or the apportionment statute of the decedent's domicile may initially turn on whether the forum state characterizes the issue as either succession or administration:

> The categories of succession and administration in estate and probate cases are roughly the equivalent of the substance and procedure dichotomy in other areas. . . . [T]he matter of apportionment is usually treated as a matter of substance or succession to which the forum's local law theoretically does not automatically apply. . . . If the matter were viewed as one of administration (procedure), the forum would apply its own local law.

Scoles, *supra*, at 267-68.

Assuming the court treats the issue as one of succession, the court next will examine the forum's conflict-of-laws rules to determine which state's substantive law should ap-

courts hold that, because the forum state is the situs of the property, its law applies,[167] other courts have rejected this conclusion based on a governmental interest analysis, holding that the law of the testator's domicile applies.[168] A determination by

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ply. A court using a vested rights theory of conflicts would likely apply its own apportionment statute to govern the controversy based upon the situs of the non-probate asset. *See, e.g.*, Isaacson v. Boston Safe Deposit & Trust Co., 325 Mass. 469, 91 N.E.2d 334 (1950). A court using the non-traditional governmental interest analysis probably would reject the law of the situs based upon the strength of the interest of the decedent's domicile when compared to that of the forum. Mazza v. Mazza, 475 F.2d 385 (D.C. Cir. 1973).

Governmental interest analysis clearly is the more appropriate test. In *Mazza* the court refused to consider the situs of the non-probate asset because a vested rights analysis seemed inappropriate to the allocation of federal estate taxes:

> Concerns with the stability of use of, and marketability of title to, land were bases of the traditional conflicts rule that the law of the situs governs questions of succession to land, and allocation of the federal estate taxes is at least a related issue. In respect to such considerations, however, it is possible to distinguish between questions of succession to land and those concerning apportionment of estate taxes against the land. The question of apportionment could affect title to the land only indirectly at best, and would in any event affect only a portion of the value. Unlike questions relating to the validity of title, the issue of tax liability is one of short duration. The attenuation of this relationship suggests that a principal reason for the concern with stability of title—the danger of third-party reliance on the law of the situs—is insubstantial with regard to the responsibility for estate taxes. Since it seems that the interests underlying the traditional rule are not involved in this case, the rule cast no weight into the balance.

Id. at 391.

While the logic of *Mazza* is compelling, some states, as illustrated by *Isaacson*, will continue to apply their apportionment law based upon the situs of the non-probate transfer, frustrating the efforts of the personal representative to obtain a proportionate distribution of the tax. To resolve this problem, Scoles advocates that all states adopt the following provision:

> Estate or death taxes imposed by the United States by reason of the inclusion of real or personal property located or administered in this state in the estate for tax purposes of a non-resident of this state shall be apportioned among the persons interested in the estate to whom such property may be transferred or to whom any benefit accrues only in accordance with the law of the decedent's domicile applicable to property located therein.

Scoles, *supra*, at 309.

167. *See, e.g.*, Isaacson v. Boston Safe Deposit & Trust Co., 325 Mass. 469, 91 N.E.2d 334 (1950). *Isaacson* was an action by an executor against a trustee to charge the trust with its pro rata share of the estate's taxes. The trust property was in Massachusetts, a residue jurisdiction, but the decedent was domiciled in Maine, an apportionment jurisdiction. The court, noting the plethora of contacts the trust had with the forum state, held "that to apply the Maine statute in this case would be to give to that statute extraterritorial effect contrary to first principles." *Id.* at 471, 91 N.E.2d at 336 (citing RESTATEMENT OF CONFLICTS §§ 47-49 (1934)).

168. Mazza, 475 F.2d 385; *see, e.g.*, Doetsch v. Doetsch, 312 F.2d 323 (7th Cir. 1963). In *Mazza* the court, referencing *Doetsch*, listed three reasons why the interests of the

a court that the law of the testator's domicile governs the controversy ultimately will result in a judgment against the nonresident beneficiary in the amount of the tax liability.[169] A determination by a court that the forum's own law will apply may result in apportionment, depending on what type of apportionment statute the state uses and how it interprets its own law.[170]

H. Application

Since the enactment of the Uniform Act in 1958, the traditional estate tax has undergone a variety of changes. Although the Uniform Act is based on the federal estate tax as it existed in 1958, subsequent congressional modifications to the estate tax have made the Uniform Act antiquated in some instances. Thus, application of the Uniform Act to several of the Code's provisions is now problematic.

Under section 2035(d) of the Code, the amount of gift tax paid by a decedent who dies within three years after making a gift to a beneficiary must be included in the decedent's gross estate, concomitantly contributing to the estate's tax liability.[171] The apportionment provisions of the Probate Code apparently do not allow the personal representative to retrieve the amount of the estate tax attributable to the gift tax payment from the recipient of the gift. Under the statute, the tax can be apportioned only "among all persons interested in the estate."[172] "Persons interested in the estate" are defined as "any person[s] enti-

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decedent's domicile were paramount to the interests of the forum:

> First, reference by all jurisdictions in which the decedent left property to the law of the decedent's domicile insures uniform treatment of all those receiving property from the decedent's taxable estate. Second, this question is similar to other problems relating to the administration of estates and to determinations of intent which are governed by the law of the domicile. Finally, the decedent's domicile is usually the jurisdiction concerned with the protection of the decedent's widow and children, and deference to that state's policy in such matters is appropriate.

475 F.2d at 389.

169. *See, e.g.*, Mazza, 475 F.2d 385; *Doetsch*, 312 F.2d 323; Trust Co. v. Nichols, 62 N.J. Super. 495, 163 A.2d 205 (1960); *In re* Peabody's Estate, 114 Misc. 706, 115 N.Y.S.2d 337 (Sup. Ct. 1952); *In re* Gato's Estate, 276 A.D. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950).

170. *See* Scoles, *supra* note 161, at ¶ 71,714.

171. I.R.C. § 2035(d).

172. S.C. CODE ANN. § 62-3-916(b) (Law. Co-op. 1987).

tled to receive, or who ha[ve] received, from a decedent or by reason of the death of a decedent any property or interest therein *included in the decedent's estate*".[173] Clearly, the gift beneficiary is not a person interested in the estate because the value of the gift is not included in the decedent's taxable estate. The IRS actually receives the property that is included in the decedent's taxable estate.

Barring the unlikely payment by the IRS of the estate tax attributable to the gift tax payment, two alternatives exist. First, the share of the tax attributable to the gift tax payment could be considered an uncollectible share, reallocated among those initially charged a share of the tax.[174] Second, an equitable argument may allow the tax to be apportioned to the beneficiary of the gift. The South Carolina General Assembly's decision to adopt an apportionment statute indicates its desire to apportion taxes on an equitable basis. Since the gift to the beneficiary generates the tax liability, it is only fair that the gift beneficiary pay this apportioned share of the tax. This result seems justified because the remaining beneficiaries already must pay an apportioned share of the tax while the gift recipient has retained his gift tax-free.

More difficult to resolve are the apportionment problems created under section 4981 of the Code. Enacted by the 1986 Tax Reform Act, section 4981A, *inter alia*, places an additional fifteen percent excise tax on "excessive accumulated distributions"[175] from qualified retirement plans, tax-sheltered annuities, and IRA's.[176] The 4981A tax was a congressional response to the perceived problem of individuals placing funds in tax-free

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173. *Id.* § 62-3-916(c)(3) (emphasis added).

174. *Id.* § 62-3-916(g).

175. Under § 4981A, the new 15% tax is generally imposed on all distributions from tax-advantaged retirement income vehicles that exceed $150,000. For purposes of this section, all retirement distributions within a calendar year, regardless of the employer, are aggregated in determining whether the retirement distributions exceed $150,000. Irish, *Estate and Gift Tax Ramifications of the Employee Benefit Provisions of the Tax Reform Act of 1986*, 21 INST. ON EST. PLAN. ¶ 1603 (1987). Retirement distribution sources that are aggregated include:

(1) A plan that was at any time qualified under I.R.C. sections 401(a) or 403(a);

(2) An annuity that was at any one time described in I.R.C. section 403(b); and

(3) I.R.A. accounts and annuities.

Id.

176. *General Explanation of the Tax Reform Act of 1986*, FED. TAXES (P-H) ¶ 59,025 at 754-55 (May 11, 1987).

retirement vehicles and not subjecting these funds to the federal income tax by subsequently withdrawing them during their retirement years.[177] Section 4981A now forces individuals to withdraw retirement contributions over a period of years as opposed to allowing them to wait and make larger, one-time withdrawals.[178]

To complement the fifteen percent additional excise tax on excessive distributions, the federal estate tax is also increased under section 4981A(d)(1) by fifteen percent of the amount of the decedent's "excess retirement accumulation."[179] Although the tax complements the federal estate tax and is paid by the personal representative, it bears little similarity to the federal estate tax. The unified credit is not used in computing the tax due.[180] Likewise, the marital deduction cannot be used to reduce the additional fifteen percent tax.[181]

Section 4981A contains no apportionment provision similar to sections 2206, 2207, or 2207A. Thus, an initial threshold inquiry must be made to decide whether a state's apportionment provisions apply to the fifteen percent tax. Under the statute, the term "tax" means "the federal estate tax and the basic and any additional [estate tax] imposed by the State of South Carolina and interest and penalties imposed in addition to the tax."[182] While the fifteen percent tax must be paid with the federal estate tax, it is certainly arguable that, given the inapplicability of the unified credit and the marital deduction, the fifteen percent tax is not an estate tax. Therefore, the tax falls outside of the statute. Furthermore, the designation of the tax as an excise tax under the Code provides further evidence that the tax falls outside of the statute.

If the section 4981A(d)(1) tax is within the apportionment provisions of the statute, it appears that, based on the statutory

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177. *Id.*

178. *See id.*

179. Irish, *supra* note 175, at ¶ 1603. The "excess retirement accumulation" is the amount that the aggregate value of the decedent's interest in qualified retirement plans exceeds "the present value of an annuity over a term certain equal to the life expectancy of the individual immediately before death with annual payments of $150,000." Irish, *supra* note 175, at ¶ 1603.

180. I.R.C. § 4981A(d)(6) (1986).

181. Irish, *supra* note 175, at 1603.

182. S.C. CODE ANN. § 62-3-916(a)(5) (Law. Co-op. 1987).

formula, the additional fifteen percent tax would be apportioned to all the beneficiaries receiving property included in the taxable estate. This anomalous result is due to the statutory formula, which apportions the tax based on "the proportion that the value of the interest of each person interested in the estate bears to the total value of the interest of all person interested in the estate."[183] The formula will not equitably apportion the tax to the beneficiaries of an estate that has a section 4981A(d)(1) tax because the formula is based on the assumption that the estate tax is calculated using only the values of the decedent's probate and non-probate transfers. This assumption obviously is not justified in the section 4981(d)(1) context.[184]

If the section 4981A(d)(1) tax is outside of the apportionment provisions of the statute, South Carolina courts may still apportion the tax based upon equitable principles established at common law.[185] Also, the argument could again be made that the General Assembly's adoption of an apportionment statute indicates its desire to apportion all taxes on an equitable basis. Absent one of these findings, the tax would be treated as a debt against the estate and would be chargeable to the residuary estate under prior South Carolina law.[186]

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183. *Id.* § 62-3-916(b).

184. An equally anomalous result occurs when the beneficiary of retirement funds becomes entitled to receive a marital or charitable deduction. Although these funds will pass to the beneficiary under the statute without an apportioned estate tax share, the retirement assets may produce a § 4981(d)(1) tax to the estate on any "excess retirement accumulations."

If the statute is applicable to the § 4981(d)(1) tax, it is possible to read it as totally exempting this beneficiary from the 4981(d)(1) tax liability, forcing the other takers of property in the taxable estate to share this tax. Under § 62-3-916(b), the tax is to be apportioned "among all persons interested in the estate." Under § 62-3-916(a)(3), a person interested in the estate means "any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate." As previously noted, *supra* notes 109-118 and accompanying text, it is arguable that since all deductible shares are included in the gross estate, this provision should be read as requiring apportionment of the estate tax to beneficiaries of deductible gifts. Given the intent of the statute's drafters, the definition of a "person interested in the estate" should be read to exclude all beneficiaries receiving a marital or charitable deduction. *Id.* This reading again would produce the inequitable result of having the excess accumulations tax apportioned against property that did not produce the tax.

185. *See* Myers v. Sinkler, 235 S.C. 162, 110 S.E.2d 241 (1959) (federal estate tax should be apportioned under common law to certain non-probate assets absent an express direction in a statute or the decedent's will).

186. *See supra* note 70 and accompanying text.

VI. EVALUATION

A. The Federal Perspective

To address the complexities of apportioning estate taxes in the multistate context, the National Conference of Commissioners on Uniform State Laws enacted the original version of the Uniform Estate Tax Apportionment Act in August 1958. In retrospect, it is safe to conclude that the Conference's goal of obtaining uniformity in the area of estate tax apportionment has failed. Not only have three different interpretations of the Uniform Act been enacted, many states have chosen to adopt apportionment statutes with provisions completely different from those comprising the three versions of the Uniform Act.[187] Most important, states disagree on the basic fundamental issue at the core of estate tax apportionment: which scheme best allocates the estate tax to the beneficiaries of a decedent's estate.[188]

The lack of uniformity in estate tax apportionment presents a multitude of problems in a mobile society. It is not uncommon for one or more of the beneficiaries of a decedent's taxable estate to reside in a state other than the decedent's state. As previously described, the problems of collection and retrieval of the tax from a nonresident beneficiary are multifarious and complex.[189] If the personal representative is unable to retrieve this tax, the remaining beneficiaries' shares may be further reduced by this uncollectible share, leaving the intent of the decedent unsatisfied.[190]

Although the various state estate tax apportionment schemes are inherently inadequate to solve the uniformity problem and its ramifications, a national policy could remedy them.[191] Congress now has a beachhead in the estate tax apportionment area with the three apportionment provisions of the Code that address general powers of apportionment,[192] life

187. *See supra* note 92.
188. *See supra* notes 57-58.
189. *See supra* notes 163-69 and accompanying text.
190. *See supra* note 168 and accompanying text.
191. Note, *supra* note 8, at 735-36.
192. I.R.C. § 2207.

insurance proceeds,[193] and Q-TIP property.[194] By themselves, these provisions represent piecemeal legislation, inconsistent with some state law apportionment provisions. Included in a national policy on estate tax apportionment, however, these provisions could represent the foundation for a national uniform estate tax apportionment statute.

B. The South Carolina Perspective

The estate tax provisions of the Probate Code represent the first comprehensive estate tax apportionment statute ever passed in South Carolina. Although the statute is a major improvement over section 12-15-1540 and brings South Carolina's apportionment scheme in line with the apportionment scheme used by a majority of the states, its adoption is not a panacea for all of the estate tax apportionment problems in South Carolina.

The major problem with the statute is its use of total equitable apportionment, which presents two major areas of difficulty. First, the statute changes the apportionment scheme used in South Carolina. Individuals who relied on South Carolina's use of partial equitable apportionment in drafting their wills may be forced to revise these documents to bring them in line with the current law.[195] Second, in changing its method of ap-

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193. I.R.C. § 2206.

194. I.R.C. § 2207A.

195. The Uniform Acts contain a procedural provision which attempts to clarify the effect of an apportionment statute on prior wills. REVISED UNIF. ESTATE TAX APPORTIONMENT ACT § 13 (1964). It states that the Uniform Act shall not apply to taxes due on account of a decedent's death within a specific time period after the enactment of the Uniform Act. The Uniform Act leaves it to each individual state to determine the appropriate time period.

The statute does not provide directly which estates will be subject to its provisions. Whether the statute will apply to estates pending at the time of the statutory enactment, will and trust instruments executed prior to the statutory enactment, or gifts made prior to the statutory enactment is still an unresolved issue. To resolve it, a two-step analysis must be applied. First, a threshold question must be addressed of whether the application of the statute to a particular estate is constitutional. Second, if the application is not unconstitutional, it must be determined whether the legislature actually intended that the statute apply to the particular estate in question. *See* Annotation, *Construction and Application of Statutes Apportioning or Prorating Estate Taxes*, 71 A.L.R.3D 247, 276-77 (1976).

A newly enacted apportionment statute that changes a state's method of apportionment may be subject to constitutional attacks if retroactively applied. It is clear, however, that a state may apply the statute to the estate of a testator who dies after the

portionment from partial equitable apportionment, South Carolina may have abandoned the apportionment method most likely to approximate the testator's intent—a goal which should be foremost in the minds of any legislative body enacting legislation having an effect upon testamentary documents.[196]

The statute also does not address several areas of appor-

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statute's enactment, regardless of when the testator's will was executed. *In Re* Whitelaw's Estate, 104 N.H. 307, 185 A.2d 65 (1962); *cf.* Parlato v. McCarthy, 136 Conn. 126, 69 A.2d 648 (1949) (apportionment statute applied to estates of persons dying up to a year prior to enactment). Similarly, when a testator dies after a statute's enactment, courts have denied assertions that the application of an apportionment statute to a trust created prior to the statute's enactment is unconstitutional. Security First Nat'l Bank v. Wellslager, 88 Cal. App. 2d 210, 198 P.2d 700 (1948); Merchants Nat'l Bank v. Merchants Nat'l Bank, 318 Mass. 563, 62 N.E.2d 831 (1945); *In re* Mayer's Estate, 174 Misc. 917, 22 N.Y.S.2d 468 (Surr. Ct. 1940).

Jurisdictions agree that the application of an apportionment statute to an estate whose administration is pending at the time of the statutory enactment is constitutional. *See, e.g.*, Merchants Nat'l Bank, 318 Mass. 563, 62 N.E.2d 831. If the pending administration has reached the point at which the liability of the various interests involved have been determined, however, these determinations cannot be altered by a subsequently enacted apportionment statute. *See* Weingarter v. Town of North Wales, 327 Mass. 731, 101 N.E.2d 132 (1951).

Since the South Carolina General Assembly did not incorporate § 13 into the new statute, it might appear unclear which estates are subject to the new apportionment rule. The general rule appears to be that "a legislative act will not be applied retroactively unless such an intent clearly appears from the language used." Annot., *supra*, at 277. In spite of this, most courts have held that the "phraseology of the typical apportionment statute is such that the courts construe it as applying to any estate the administration of which is not completed" by the time of the statute's enactment. *Id.*

Support for the proposition that the new statute applies to all wills probated after the statute's enactment, regardless of when the wills were executed, can be drawn from several South Carolina cases. In Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984), the South Carolina Supreme Court abolished dower because it violated the equal protection clauses of the United States and South Carolina Constitutions. In analyzing which interests would be affected by its decision, the court stated: "[I]t is the holding of the Court that widows whose husbands die after the filing of this opinion are barred from dower claims." *Id.* at 519, 316 S.E.2d at 403. Thus, the court refused to construe a testamentary document with regard to the law applicable at the time of the execution of the will.

A similar case was *In re* Estate of Mercer, 288 S.C. 313, 342 S.E.2d 591 (1986). In *Mercer* the supreme court invalidated § 21-7-480 of the South Carolina Code, which limited the amount of inheritance a man could bequeath or devise to "the woman with whom he lives in adultery or of his bastard child or children" as unconstitutional. The court held that the rights of all parties, though arising under a will made prior to the invalidation of the provision, would no longer be governed by that provision. The court stated: "Mindful of the rights of persons affected by the statute on the one hand, and the need for the orderly probate of estates in South Carolina on the other, we hold S.C. Code Ann. § 21-7-480 (1976) to be inapplicable to the estates of those persons dying on or after August 19, 1982." 288 S.C. at 318, 342 S.E.2d at 593.

196. *See supra* note 67 and accompanying text.

tionment law that a comprehensive statute must. Although not often done, the statute should contain a sample will provision to clarify the language necessary to override its effect.[197] Also, the statute needs to address a surviving spouse's elective share and the impact equitable apportionment will have upon this amount.[198] Other questions not answered in the statute include: (1) the allocation of expenses incurred in the collection of the estate tax,[199] (2) a choice-of-laws provision,[200] (3) the liability of a beneficiary receiving installment payments under an employee benefit plan, an insurance contract, or an installment note,[201] and (4) the allowance of interest to a beneficiary whose funds have been temporarily used to pay the estate tax.[202]

The statute also addresses certain problems inefficiently. Its shortcomings are best exemplified by section (g), which requires the personal representative to seek contribution from a noncontributing party in order to escape liability for the uncollected share.[203] This provision should be revised to alleviate the personal representative from this obligation when it is highly unlikely that the uncollected share can be recovered through a contribution action.[204] Furthermore, the personal representative should not be required to bring a contribution action when the expense necessary to recover the recalcitrant beneficiary's contribution exceeds the uncollected share.

Another area in which the statute is inefficient is its overuse of the apportionment mechanism. Under the statute, uncollected shares are reallocated among all beneficiaries who pay a share of the tax under any circumstances.[205] This rule should be replaced with a discretionary rule that allows a court to decide the most equitable and economical method of reallocating the tax.[206]

The statute's apportionment formula is also overly complex and ambiguous. As previously noted, it is difficult to determine

197. *See supra* notes 98-103 and accompanying text.
198. *See supra* notes 120-28 and accompanying text.
199. *See supra* notes 147-48 and accompanying text.
200. *See supra* note 166.
201. *See supra* notes 129-34 and accompanying text.
202. *See supra* note 155 and accompanying text.
203. S.C. CODE ANN. § 62-3-916(g) (Law Co-op. Supp. 1987).
204. Note, *supra* note 8, at 731.
205. S.C. CODE ANN. § 62-3-916(g) (Law. Co-op. Supp. 1987).
206. Note, *supra* note 8, at 732.

if the statutory formula excludes deductible shares, even though it is obvious from other provisions in the statute that these shares should be excluded from apportionment.[207] The statute also does not address the treatment of credits for foreign estate or gift tax that are generated by a beneficiary's payment of these taxes.[208]

Finally, the statute is antiquated and does not deal easily with several modifications to the federal estate tax, which were enacted subsequent to the statute's drafting.[209] Sections 2035(d) and 4981A(d)(1) of the Code are the most noteworthy examples of this problem. While a strained reading of the statute may allow for the resolution of apportionment questions under each of these sections, the statute obviously is not designed to deal with apportionment in these situations, which is evidenced by the inequitable results produced when the statute is applied to these Code sections. Clearly, an amendment to the statute addressing apportionment under these two areas of the Code is required to make the statute both comprehensive and equitable.

C. Conclusion

The area of estate tax apportionment is characterized by a strange interrelationship between the Code and the various state statutes that attempt to allocate the estate tax burden. Thus, the question of which beneficiaries of a decedent's probate and non-probate transfers will pay the estate's tax liability is not easily answered. In the context of multistate estates, the question cannot be answered with any degree of certainty given the divergent state approaches to the problem and the lack of a comprehensive federal policy.

Because it is the responsibility of the states to allocate the federal and state estate tax burden when the testator's will is silent, each state must have a comprehensive estate tax apportionment statute. The adoption of the new South Carolina estate tax apportionment statute meets this need. Although portions of the statute may need to be amended in an attempt to rectify its shortcomings, it is a tremendous improvement over the previous

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207. *See supra* notes 112-18 and accompanying text.
208. *See supra* notes 143-46 and accompanying text.
209. *See supra* notes 171-86 and accompanying text.

statute.

It is important to realize, however, that any state apportionment statute, no matter how well drafted, may be insufficient to compel contribution from all of the estate's beneficiaries,[210] particularly in the multistate context. Under the statute, the inability of a personal representative to obtain contribution from a recalcitrant out-of-state beneficiary will result in apportionment of the uncollected estate tax to the remaining beneficiaries. Depending on the size of the recalcitrant beneficiary's share, this could substantially frustrate the intent of the testator.

With this in mind, it is important that an estate planner never rely on the new South Carolina statute to dictate which assets will bear the burden of the estate's tax liability. Since a testator virtually has complete authority to determine which of his probate and non-probate assets will bear the estate tax burden, an estate planner should deal with this issue only through an estate tax allocation clause in the decedent's will.[211]

*James Howle Lucas**

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210. Under the Probate Code, the terms devisee and beneficiary are not interchangeable. A devisee under the Probate Code includes those individuals "designated in a will to receive a devise." S.C. CODE ANN. § 62-1-201(8) (Law. Co-op. 1987). A devise, when used as a noun, "means a testamentary disposition of real or personal property, including both devise and bequest as formerly used. . . ." *Id.* § 62-1-201(7).

The term beneficiary under the Probate Code now relates solely to trust beneficiaries. It includes "a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust." *Id.* § 62-1-201(2).

The usage of the term beneficiary has been expanded beyond the § 62-1-201(2) definition for the purposes of this Note. For example, the term has been used to describe those persons who benefit from a decedent's non-probate transfers. It has also been used to describe all persons entitled to receive or who have received any property or interest included in a decedent's taxable estate.

211. A provision in a will designating that specific property be responsible for the payment of the entire estate tax or its specific share of the estate tax may not be sufficient to preclude the operation of an apportionment statute. When specific property is made responsible for the payment of estate taxes, if the property is not sufficient to pay its share or the entire share of the tax if required, the apportionment statute has been held to apply to the amount of the deficiency. *See generally* Annot., *supra* note 195, at 388-43. If a testator wants to make certain non-probate transfers responsible for their proportionate share of the estate tax, a provision providing for an alternative means for the payment of the tax if the non-probate transfer has been exhausted should be included in the tax clause.

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SOUTH CAROLINA ESTATE TAX APPORTIONMENT STATUTE

Section 62-3-916

(a) For purposes of this section:

(1) "Estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this State.

(2) "Person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

(3) "Persons interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee.

(4) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(5) "Tax" means the federal estate tax and the basic and any additional estate tax imposed by the State of South Carolina and interest and penalties imposed in addition to the tax.

(6) "Fiduciary" means personal representative or trustee.

(b) Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in this Code, the method described in the will controls.

(c) (1) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose, may determine the apportionment of the tax.

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by

the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(4) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Code, the determination of the court in respect thereto shall be prima facie correct.

(d) (1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with §§ 62-1-101 through 62-7-503.

(2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(e) (1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate, and for any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of

all persons liable to apportionment.

(4) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof applicable to property or interest includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar purpose is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (b) hereof, and to that extent no apportionment is made agianst the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(f) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remiander is chargeable against the corpus of the property or funds subject to the temporary interst and remainder.

(g) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(h) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this State and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this State or who owns property in this State subject to attachment or execution. For the purposes of the action, the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.